SUPREME COURT, U. S.

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In The

Supreme Court of the United States

NO: 73-693 October Term, 1973

COMMONWEALTH OF PENNSYLVANIA and BUCKS COUNTY INTERFAITH HOUSING CORPORATION, a Non-Profit Corporation, SUSAN CUMMINGS, RAMONA MORALES SERRANO, JEANNE COTTON, PEDRO ORTIZ, OLIVIA MOFFIT, Individually and on Behalf of Others Similarly Situated,

Petitioners,

vs.

COUNTY OF BUCKS and BUCKS COUNTY PLANNING COMMISSION and BUCKS COUNTY HOUSING AUTHORITY and All of the Municipalities of Bucks County (Individually Named in Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania),

Respondents.

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR RESPONDENT, BENSALEM TOWNSHIP

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In The

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October Term, 1973

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Respondents.

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR RESPONDENT BENSALEM TOWNSHIP

STATEMENT OF THE CASE

Respondent, Bensalem Township, accepts the petitioners' statement of the case except for what it believes is necessary to correct the following inaccuracies:

Petitioners allege that the complaint was dismissed on the federal grounds that petitioners did not have standing to assert their federal claims and that consideration of these federal claims would not be a justiciable issue. Respondent, Bensalem Township, believes that the federal questions alleged by petitioners did not arise at any time in the state court proceedings, and were not at any stage in the state proceedings, considered, reached, ruled upon, or applied by the state court. To the contrary, the Supreme Court of Pennsylvania denied the petition solely on the issue of Pennsylvania statutory rules of procedure and general principles of law relating to what is a cognizable and justiciable cause of action in the Courts of Pennsylvania (Petition for Certiorari, Appendix C, A9).

Respondent, Bensalem Township, further believes the federal questions raised by petitioners present no real and substantial questions for the Court to decide, in view of a clear statutory remedy in the state courts.

ARGUMENT

I.

THE UNITED STATES SUPREME COURT IS WITHOUT JURISDICTION TO GRANT THE PETITION FOR A WRIT OF CERTIORARI.

The jurisdiction for this petition for writ of certiorari is alleged to be under 28 U.S.C. Section 1257 (3):

> "Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: (3) By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

It is basic hornbook law that the federal right or question proposed for Your Honorable Court must have been distinctly and clearly presented for decision in the state court, have been considered and applied by the state court, and have been adjudicated adversely to the claimants. See, e.g. Rule 19.1(a), *Copperwald Steel Co. v. Industrial Commission of Ohio*,324 U.S. 780, 89 L. Ed. 1363, 65 S. Ct. 1006 (1945); *Fox Film Corp. v. Muller*, 296 U.S. 207, 80 L. Ed. 158, 56 S. Ct. 183 (1935); *Socialist Labor Party v. Gilligan*,406 U.S. 583, 32 L. Ed.2d 317 (92 S. Ct. 1716 (1972).)

Argument

Respondent, Bensalem Township, concedes that petitioners raised in their voluminous complaint various federal rights (see, Petition for Writ of Certiorari, Appendix G, A26-A29), but believes that the Pennsylvania Courts did not decide the case on the basis of any such federal right or question. Their complaint was dismissed entirely on questions of Pennsylvania statutory procedure.

At no time have the petitioners, one of which is the Commonwealth of Pennsylvania, challenged the state law under which municipalities are empowered to enact zoning ordinances and regulations. The *Pennsylvania Municipalities Planning Code (MPC)* of July 31, 1968, P. L. , No. 247, as amended, 53 P.S. Section 10101 et seq. Yet it is the MPC which provides the exclusive and constitutionally adequate means of challenging the validity of zoning ordinances by any person aggrieved by such ordinances. See, *Unger v. Township of Hampton*, 437 Pa. 399, 263 A. 2d 385 (1970).

The Trial Court did not adjudicate, deny or in any way adversely affect the rights of petitioners; as the Court stated:

> "... it does not undertake to decide academically the unconstitutionality or other alleged invalidity of legislation until it is brought into operation so as to impinge upon the rights of some person or persons. Knup v. Philadelphia, supra, 386 Pa. at 353" (Petitioners' Appendix C, A10).

Argument

Respondent, Bensalem Township, concedes that petitioners have "standing" to challenge alleged discriminatory zoning practices by a particular municipality. Respondent, Bensalem Township, agrees with petitioners' contention that:

> "The Commonwealth (of Pennsylvania) has the inherent power to effect legislation dealing with the preservation of the public health, safety, morals and general welfare of all its citizens and the Commonwealth (of Pennsylvania) has enacted legislation delegating certain areas of its police powers to subordinate public bodies and agencies . . . in regard to comprehensive planning, subdivision and land development . . . (Petitioners' Complaint *our* Appendix A, Paragraph 108).

and further

> ". . . The Commonwealth did not, and could not, delegate to the Municipalities the authority to consider only the welfare of the present residents of the Municipality and not the welfare of all the residents of the Commonwealth, and Section 701 of the Code . . . provides for consideration by the Municipalities of the interests of 'all the citizens and residents of this State' " (Petitioners' Complaint, *our* Appendix A, Paragraph 109).

In further amplification of the clear proposition that petitioners have a full and adequate statutory remedy within the Commonwealth of Pennsylvania Courts, the Municipal Planning Code includes provisions whereby

"persons aggrieved" may challenge the provisions or validity of a Municipality's zoning ordinance on substantive grounds.

The United States Supreme Court, in *Utley v. St. Petersburg*, refused to review the state court decision, finding that an adequate administrative remedy was afforded petitioners by the challenged state statute and further finding that the objectors had ignored the available remedy. *Utley v. St. Petersburg*, 292 U.S. 106, 78 L. Ed. 1155, 54 S. Ct. 593 (1934).

Petitioners have at no stage of these proceedings attempted to avail themselves of their clear and basically simple statutory rights. Petitioners have at no stage of these proceedings attempted to demonstrate with evidence and facts that respondent, Bensalem Township, which does allow and now has within its borders, federally-subsidized housing, discriminates against petitioners economically, racially, or in any other manner. Petitioners have at no stage in these proceedings pursued or been denied the enforcement powers of the various courts of the Commonwealth of Pennsylvania, but rather have been denied their quest for an advisory opinion as to overly-broad allegations of discrimination against all respondents.

Petitioners, including the Commonwealth of Pennsylvania, failing to attack the enabling legislation of the Commonwealth of Pennsylvania (MPC), are attempting to attack collaterally respondent Township's use and application of the enabling legislation. The various courts of Pennsylvania have long recognized the rights of all

citizens and residents of the Commonwealth in matters of land use and zoning, and have consistently acted to protect and preserve those rights where municipal ordinances or regulations are determined to be invalid or unconstitutional on their face or in their application. See e.g. *National Land and Investment Company v. Easttown Township Board of Adjustment*, 419 Pa. 504, 215 A2d 597 (1965); *Girsh* Appeal, 437 Pa. 237, 263 A2d 395 (1970). Yet, as the Trial Court in the instant proceedings found:

> "It is almost hornbook law that the statutory remedies and methods of procedure to raise questions of interpretation, application and validity of zoning ordinances are exclusive and must be strictly pursued" (Petitioners' Appendix C, A9).

Their petition for writ of certiorari to Your Honorable Court boldly seeks, not legal redress for alleged wrongs, but rather the concurrence of the Court in their unsubstantiated and untested opinion that discrimination is practiced by the various respondents.

Their raising of federal questions, whether timely or not, but not actually decided, is merely an attempt to "bootstrap" themselves into a position of being aggrieved parties properly before the Court.

Granting a petition for writ of certiorari in the present posture of these proceedings will lead the Court merely to the issuance of an advisory opinion concerning abstract principles of discrimination in relation to zoning, without

a judicial resolution of the issues of constitutionality, and therefore the exercise of jurisdiction by Your Honorable Court by issuance of a writ of certiorari is certainly unwarranted.

CONCLUSION

Respondent, Bensalem Township, respectfully prays Your Honorable Court to enter its order denying the petition for writ of certiorari to the Supreme Court of Pennsylvania.

JOHN W. DEAN, III
DEAN AND McCOY
Attorneys for Respondent,
BENSALEM TOWNSHIP

APPENDIX A

PARAGRAPHS OF COMPLAINT

108. The Commonwealth has the inherent power to effect legislation dealing with the preservation of the public health, safety, morals and general welfare of all its citizens and the Commonwealth has enacted legislation delegating certain areas of its police powers to subordinate public bodies and agencies, giving them authority to enact ordinances promoting the public health, safety, morals and general welfare, in regard to comprehensive planning, subdivision and land development, and zoning, by the legislative enactment of the Pennsylvania Municipalities Planning Code of 1968, Act No. 247, 53 P.S. 10101, et seq. (hereinafter referred to as "Code".)

109. The Commonwealth did not, and could not, delegate to the Municipalities the authority to consider only the welfare of the present residents of the Municipality and not the welfare of all the residents of the Commonwealth, and Section 701 of the Code, 53 P.S. 10701 provides for the consideration by the Municipalities of the interests of "all citizens and residents of the State."

APPENDIX B

PENNSYLVANIA MUNICIPALITIES PLANNING CODE

Section 105. Purpose of Act. - It is the intent, purpose and scope of this act to protect and promote safety, health and morals; to accomplish a coordinated development of municipalities, other than cities of the first and second class; to provide for the general welfare by guiding and protecting amenity, convenience, future governmental, economic, practical, and social and cultural facilities, development and growth, as well as the improvement of governmental processes and functions; to guide uses of land and structures, type and location of streets, public grounds and other facilities; and to permit municipalities, other than cities of the first and second class, to minimize such problems as may presently exist or which may be foreseen. It is the further intent of this act that any recommendations made by any planning agency to any governing body shall be advisory only.

Section 701. Purposes. - In order that the purposes of this act be furthered in an era of increasing urbanization and of growing demand for housing of all types and design; to insure that the provisions of Article VI which are concerned in part with the uniform treatment of dwelling type, bulk, density and open space within each zoning district, shall not be applied to the improvement of land by other than lot by lot development in a manner that would distort the objectives of that Article VI; to encourage innovations in residential development and renewal so that the growing demand for housing may be met by greater variety in type, design and layout of dwellings and by the conservation and more efficient use of open space ancillary to said dwellings; so that greater

opportunities for better housing and recreation may extend to all citizens and residents of this State; and in order to encourage a more efficient use of land and of public services and to reflect changes in the technology of land development so that economies secured may enure to the benefit of those who need homes; and, in aid of these purposes, to provide a procedure which can relate the type, design, and layout of residential development to the particular site and the particular demand for housing existing at the time of development in a manner consistent with the preservation of the property values within existing residential areas, and to insure that the increased flexibility of regulations over land development authorized herein is carried out under such administrative standards and procedures as shall encourage the disposition of proposals for land development without undue delay, the following powers are granted to all municipalities (Section 702 - Grant of Powers - Deleted).

Section 1011. Judicial Relief. - (1) In a zoning appeal the court shall have power to declare any ordinance or map invalid and to set aside or modify any action, decision or order of the governing body, agency or officer of the municipality brought up on appeal.

(2) If the court finds that an ordinance or map or a decision or order thereunder which has been brought up for review unlawfully prevents or restricts a development or use which has been described by the landowner through plans and other materials submitted to the governing body, agency or officer of the municipality whose action or failure to act is in question on the appeal, it may order the described development or use approved as to all elements or it may order it approved as to some elements and refer

other elements to the governing body, agency or officer having jurisdiction thereof for further proceedings including the adoption of alternative restrictions, in accordance with the court's opinion and order. The court shall retain jurisdiction of the appeal during the pendency of any such further proceedings and may, upon motion of the landowner, issue such supplementary orders as it deems necessary to protect the rights of the landowner as declared in its opinion and order.

(3) The fact that the plans and other materials referred to in subsection (1) are not in a form or are not accompanied by other submissions which are required for final approval of the development or use in question or for the issuance of permits shall not prevent the court from granting the definitive relief authorized in subsection (2) and the court may act upon preliminary or sketch plans by framing its decree to take into account the need for further submissions before final approval is granted.